IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

LAWRENCE MERELY VANDER ESCH, Applicant. v. **THE STATE OF IOWA,** Respondent.	**CASE NO. PCCV021251** **RULING ON CROSS MOTIONS FOR SUMMARY DISPOSITION**

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This matter came before the Court on September 1, 2006, pursuant to Applicant Lawrence Merely Vander Esch's ("Vander Esch") Motion for Summary Disposition and The State of Iowa's ("State") Cross Motion for Summary Disposition. Francis Goodwin appeared on behalf of Vander Esch, and Assistant Attorney General Charles Thoman appeared on behalf of the State. Both parties waived oral arguments and presented written arguments, and the matter was submitted. Having reviewed the record and considered the arguments of the parties, the Court now rules as follows:

STATEMENT OF FACTS

In June of 1998, Vander Esch was a co-owner of Pizza Ranch restaurants in Sioux County. *State v. Vander Esch*, 662 N.W.2d 689, 690 (Iowa Ct. App. 2002), *overruled by State v. Bolsinger*, 709 N.W.2d 560 (Iowa 2006). Around this time, Vander Esch asked a young male employee at one of the restaurants if he would be willing to donate a semen sample for a scientific research project and stated that he would receive fifty dollars for a successful donation. *Id.* at 690-91. The employee agreed to the procedure. *Id.* at 691. Vander Esch proceeded to show the employee his own penis to make him feel comfortable. *Id.* He then put a condom on the employee; when the procedure was completed, he "milked" the penis to get the semen out and took the condom off. *Id.* Next, he tied the condom, put it on ice, and stated that it would be sent to a laboratory for testing. *Id.* He subsequently told the employee that the sperm count was not high enough to be paid for the sample. *Id.* Similar circumstances occurred on a second occasion with respect to the same employee and on two occasions with respect to another young male employee. *Id.* Vander Esch was never authorized by any scientific body to collect semen

samples. *Id.* The victims would not have consented to the sex acts if they had known that no legitimate research project existed. *Id.*

Vander Esch was charged with four counts of sexual abuse in the third degree in violation of Iowa Code §§ 709.1(1),[1] which defines sexual abuse and provides that certain circumstances will vitiate a victim's consent, and 709.4(1),[2] which defines sexual abuse. *Id.* Next, Vander Esch filed a motion to dismiss the charges against him, claiming that the young male employees had consented to the sex acts. *Id.* Specifically, he claimed that section 709.1(1) sets forth the only means recognized to negate consent and that fraud and deceit, which are not listed in that section, do not negate consent. *Id.* The district court denied Vander Esch's motion to dismiss, relying on section 709.5,[3] which provides that the surrounding circumstances may be considered in determining whether the sex act was done by force or against the will of another. *Id.* The district court concluded that section 709.1(1) gives examples of conduct that is against one's will but does not exclude other possible means, such as fraud or deception, per section 709.5. *Id.* After the district court denied the motion to dismiss, Vander Esch pled guilty on August 20, 2001, to the charges and was sentenced to concurrent terms of imprisonment not to exceed ten years. *Id.* at 692.

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[1] Section 709.1(1) states that

> [a]ny sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:
> 1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

Iowa Code § 709.1(1) (2005).

[2] Section 709.4(1) states that

> [a] person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:
> 1. The act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabitating with the person.

Id. § 709.4(1).

[3] Section 709.5 provides as follows:

> Under the provisions of this chapter it shall not be necessary to establish physical resistance by a person in order to establish that an act of sexual abuse was committed by force or against the will of the person. However, the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other.

Id. § 709.5.

Vander Esch appealed his convictions to the Iowa Court of Appeals, arguing that "section 709.1(1) does not permit a conviction for sexual abuse on a theory of fraud or deception." *Id.* at 690, 692. In support thereof, Vander Esch relied upon the doctrine of *inclusio unius est exclusio alterius*, "which means that when certain items are listed, there is an inference that the exclusion of other terms is intentional." *Id.* at 692 (citation omitted). He claimed that consent is negated under section 709.1(1) "only if: (1) it was procured by threats of violence toward any person; (2) the victim is under the influence of a drug inducing sleep; or (3) the victim is otherwise in a state of unconsciousness." *Id.* Because the legislature listed only these items, Vander Esch argued that these are the only means to negate consent and that fraud and deceit, which are not listed in section 709.1(1), cannot negate consent. *Id.*

To resolve this issue, the Court engaged in statutory construction. *Id.* In doing so, the Court concluded that section 709.1(1) is not the only section that deals with whether a sex act is done by force or against the will of another and that section 709.5 allows the court to examine all of the surrounding circumstances to determine if an act is done by force or against the will of another. *Id.* at 693. According to the Court, "Vander Esch's interpretation of section 709.1(1) would make superfluous or void the provision of section 709.5 to consider all of the circumstances surrounding the act. . . ." *Id.* Therefore, the Court concurred with the district court's conclusion that the legislature in section 709.1(1) gave examples of conduct that is done by force or against the will of another but did not exclude other possible means. *Id.*

Next, the Court turned to the question of whether the deception in this case amounted to fraud in the factum or fraud in the inducement. *Id.* If the deception involves a misunderstanding of the fact itself (that is, fraud in the factum), no consent exists. *Id.* (citing *Boro v. Superior Ct.*, 210 Cal. Rptr. 122, 124 (Cal. Ct. App. 1985)) (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* ch. 9, § 3, at 1079 (3d ed. 1982)). On the other hand, if the deception relates not to the thing done but something collateral to it (that is, fraud in the inducement), consent exists. *Id.* (citing *Boro*, 210 Cal. Rptr. at 124) (citing Perkins & Boyce, *Criminal Law* ch. 9, § 3, at 1079). The Court concluded that the fraud in this case was fraud in the factum and not fraud in the inducement so that no consent existed: "[T]he victims in the present case consented to a pathological, or medical, procedure. They did not consent to be participants in a sex act." *Id.* at 694. Therefore, the Court affirmed Vander Esch's convictions. *Id.*

On February 10, 2006, the Iowa Supreme Court issued its opinion in *State v. Bolsinger*, which overruled *State v. Vander Esch*. *Bolsinger*, 709 N.W.2d at 565. In *Bolsinger*, the defendant, a program supervisor at a state facility for delinquent boys, took boys into a private room and touched their genitals, claiming that he was checking for bruises, scratches, hernias, and testicular cancer. *Id.* at 562. The boys testified at trial that the defendant asked permission to touch them in this way and that he did not appear to gain sexual gratification from the touching. *Id.* They also testified that they were not aware that they were being touched in a sexual manner and that if they had known the true reason for the touching they would not have consented. *Id.* The defendant was subsequently convicted of sexual abuse in the third degree under section 709.4(1). *Id.* at 561.

On appeal to the Iowa Supreme Court, the defendant argued that the district court erroneously gave the following jury instruction, which the court gave based on the language of section 709.4(1) and 709.5 and on the *Vander Esch* case:

> Concerning [the third-degree sexual abuse counts] the State must prove that the defendant committed a sex act "by force or against the will" of the alleged victim in that Instruction. In order to do so, however, the State does not have to prove that the alleged victim physically resisted the defendant's acts. The force used by the defendant does not have to be physical. *An act may be done "by force and against the will" of another if the other's consent or acquiescence is procured by:*
> 1. *threats of violence; or*
> 2. *deception, which may include deception concerning the nature of the act or deception concerning the defendant's right to exercise authority over the other under the circumstances.*
>
> You may consider all of the circumstances surrounding the defendant's act in deciding whether the act was done by force or against the will of the alleged victim.

Id. at 562-63 (emphasis added). The defendant argued that "Iowa's sex abuse law in effect provides no way to vitiate consent based on fraud" under the doctrine of *inclusio unius est exclusio alterius*. *Id.* at 565. The defendant essentially made the same argument that was made in *Vander Esch* that "the Code sets out a limited list of circumstances under which consent may be vitiated," which include the victim's age, a mental defect or incapacity, a physical incapacity, and the influence of controlled substances, and that fraud and deception are not listed as such a circumstance. *Id.* (citing Iowa Code §§ 709.4(2)(a), (b) and (c), (3), (4)).

The Court, however, did not agree with the defendant:

> Contrary to [defendant's] argument, we believe that these are not the only circumstances in which consent can be vitiated and that fraud in fact should be held to vitiate consent in sexual abuse cases just as it does in any other criminal case. We rejected a similar *inclusio unius est exclusio alterius* argument in *State v. Ramsey*, 444 N.W.2d 493 (Iowa 1989), which involved a statute prohibiting the removal of a person without their consent. We held that deception by the defendant vitiated the victim's consent.
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> > [The defendant] contends that because the word "deception" is not used in section 710.1, it cannot form the basis upon which his conviction rests. Ramsey is confusing means with ends, however. Ramsey's intent, as expressed by his girlfriend and logically inferred from subsequent events, was to remove an innocent person to a remote location, shoot him, and steal his car. Whether the removal was accomplished by force or artful deception, the end result remains the same.
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> *Id.* at 494. *Ramsey* involved fraud in fact: the victim agreed to give the defendant a ride, not to be shot in the back of the head. *Id.* at 493-94.

Id. Therefore, the jury instruction given was not an erroneous statement of the law in that fraud or deceit may vitiate consent.

The defendant, nevertheless, argued that any fraud involved was fraud in the inducement, not fraud in the factum because "each of these young men was told what the touching would consist of and that they were then touched in the exact manner they expected" and his unexpressed purpose, sexual gratification, was collateral to the sexual act itself. *Id.* at 563, 564. The defendant, therefore, claimed that the consent had not been vitiated. *See id.* at 564.

According to the Court, "[i]f an act is done that is different from the act the defendant said he would perform, this is fraud in fact. If the act is done as the defendant stated it would be, but is for some collateral or ulterior purpose, this is fraud in the inducement." *Id.* (citing Perkins & Boyce, *Criminal Law* ch. 9, § 3, at 1079). Stated another way,

> if deception causes a misunderstanding as to the fact itself (fraud in the *factum*) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).

Id. (quoting Perkins & Boyce, *Criminal Law* ch. 9, § 3, at 1079) (citation omitted). As applied to the *Bolsinger* case, the Court found as follows:

> [I]f the boys had consented to acts such as massaging their legs and instead [the defendant] had touched their genital area, this would clearly be fraud in fact; they would have consented to one act but subjected to a different one. That is not the case, however. We conclude that the consents given here were based on fraud in the inducement, not on fraud in fact, as the victims were touched in exactly the manner represented to them. The consents, therefore, were not vitiated.

Id.

The Court also found that the conclusion that the consent in *Bolsinger* was based on fraud in the inducement and not fraud in the factum "calls into question the court of appeals case of *Vander Esch*." *Id.* at 565. The Court ultimately decided in *Bolsinger* to overrule *Vander Esch* "because the facts on which that case was based clearly show fraud in the inducement, not fraud in fact." *Id.*

In response, on April 10, 2006, Vander Esch filed his Application for Post-Conviction Relief. Vander Esch requested that his convictions, although fully served, be vacated due to the Iowa Supreme Court's opinion in *Bolsinger* that overruled the Iowa Court of Appeal's opinion in *Vander Esch*.

The State filed its answer on June 5, 2006, denying the material allegations of the petition and claiming that *Bolsinger* cannot be retroactively applied to this case and Vander Esch's convictions should not be vacated.

On July 7, 2006, Vander Esch filed his Motion for Summary Disposition, claiming that *Bolsinger* should be retroactively applied to this case. Vander Esch claims that the appropriate analysis for determining the retroactivity of new case law is determined by considering and balancing three factors: (1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of retroactive application of the new standards. According to Vander Esch, underlying all of these considerations is the basic inquiry as to how seriously the invalid prior rule affected the very integrity of the fact-finding process or produced the clear danger of convicting the innocent. Applying these standards, Vander Esch claims that the rule announced in *Bolsinger* seriously implicates the truth finding process by preventing the conviction of the innocent. Furthermore, Vander Esch argues that law enforcement has not relied on the rule announced in *Vander Esch* to any great extent, given the very small number of cases involving facts like this one. Finally, Vander Esch claims that the State does not have a strong argument

that a major effect on the administration of justice would occur if *Bolsinger* were retroactively applied, given the very small number of cases involving facts like this one. Therefore, Vander Esch concludes that in balancing the three factors it is clear that *Bolsinger* should be retroactively applied to this case.

On July 31, 2006, the State filed its Motion for Summary Disposition and its Resistance to Applicant's Motion for Summary Disposition. The State agrees with Vander Esch's version of the statement of the facts; therefore, no genuine issue of material fact exists. The State, however, disputes that the decision in *Bolsinger* should be retroactively applied to this case. The State argues that one must first determine whether the case is final (and is now being collaterally attacked) or whether the case is on direct review. According to the State, if the case is final, the retroactivity rule to be applied is as follows: New rules of constitutional procedure are not applicable to those cases that have become final before the new rule is announced, unless an exception applies. The State contends that Vander Esch's case was final when *Bolsinger* was decided. Moreover, the State claims that none of the exceptions apply; therefore, Vander Esch is not entitled to retroactive application of *Bolsinger*.

In the alternative, the State argues that even if the Court were to adopt Vander Esch's retroactivity analysis Vander Esch is not entitled to retroactive application of *Bolsinger*. The State claims that the Iowa Supreme Court's new interpretation of sexual abuse and consent in *Bolsinger* had nothing to do with correcting an impairment in the truth finding process but merely redefined the meaning of consent in sexual abuse cases; therefore, this factor mitigates against retroactive application. In addition, the State points out that reliance on the legal definition of consent set forth in *Vander Esch* was used by the prosecution in *Bolsinger*; therefore, this factor mitigates against retroactive application. Finally, the State argues that there is no way to determine what effect retroactive application of *Bolsinger* would have on the administration of justice in Iowa because there is no accurate way to gauge the number of prosecutions that have relied upon *Vander Esch*. As such, the State concludes that in balancing the three factors it is clear that *Bolsinger* should not be retroactively applied to this case.

On August 23, 2006, Vander Esch filed his Reply to State's Citation of Authorities. Vander Esch does not dispute that his case was final when *Bolsinger* was decided nor does he dispute that he must show that the rule announced in *Bolsinger* falls within an exception to the general rule that new rules of criminal law do not apply retroactively to final convictions.

Vander Esch argues that the rule announced in *Bolsinger* falls under an exception to the general rule of non-retroactivity. Specifically, Vander Esch claims that the rule announced in *Bolsinger* was a substantive rule, not a procedural rule. According to Vander Esch, *Bolsinger* narrowed the scope of a criminal statute by interpreting critical terms. As a result of the rule announced in *Bolsinger*, Vander Esch claims that he currently stands convicted of a crime for conduct which the law does not make criminal. Therefore, he claims that the rule in *Bolsinger* must be retroactively applied to this case and that his convictions must be vacated.

SCOPE OF REVIEW

Under Iowa Code § 822.6, either party in a postconviction relief proceeding may move for summary judgment; and the court may grant the motion "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6 (2005). Iowa courts have held that summary disposition under § 822.6 "is analogous to our summary judgment procedure provided by [our Rules of Civil Procedure]." *Ridinger v. State*, 341 N.W.2d 734, 736 (Iowa 1983). Therefore, general summary judgment principles in civil cases should be applied to postconviction relief proceedings in which a party moves for summary disposition.

Summary judgment is proper if the entire record before the court shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Goodenow v. City Council of Maquoketa*, 574 N.W.2d 18, 22 (Iowa 1998); *Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405 (Iowa 1993). It is axiomatic that the determination of whether a party is entitled to judgment as a matter of law is a legal question, not a factual resolution. *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998). An issue of fact is "material" for summary judgment purposes when resolution of the fact will affect the outcome of the suit, given the applicable governing law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998); *Humphries v. Methodist Episcopal Church*, 566 N.W.2d 869, 872 (Iowa 1997); *Fees v. Mut. Fire & Auto Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Hall v. Barrett*, 412 N.W.2d 648, 650 (Iowa Ct. App. 1987). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300

(Iowa 1996) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

In addition, an issue of material fact is genuine if it has a real basis in the record. *Matsushita Elec. Indus. Co.*, 475 U.S. 574. The record includes the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. *Fees*, 490 N.W.2d at 57. Allegations contained in a pleading that have not been withdrawn or superseded are conclusive admissions of the facts stated and may be used by an opposing party in support of its motion for summary judgment. *Sheerin v. Holin Co.*, 380 N.W.2d 415, 417 (Iowa 1986).

In ruling on a motion for summary judgment, the court must examine the record in the light most favorable to the party opposing the motion. *Reiger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998); *Orahaus v. State*, 584 N.W.2d 270, 272 (Iowa 1998); *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 258 (Iowa 1991). Every legitimate inference that can reasonably be deduced from the evidence should be afforded the party resisting the motion for summary judgment, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 195 (Iowa 1985); *Kilts v. American Legion Okoboji Lakes Post 654*, 581 N.W.2d 189, 190 (Iowa Ct. App. 1998); *Thornton v. Hubill, Inc.*, 571 N.W.2d 30, 32 (Iowa Ct. App. 1997). If the conflict consists only of the legal consequences flowing from undisputed facts or from facts viewed most favorably toward the resisting party, summary judgment is proper. *Amerus Prop. Brokers v. Hicklin*, 585 N.W.2d 245, 247 (Iowa 1998); *Humphries*, 566 N.W.2d at 872; *Paul v. Ron Moore Oil Co.*, 487 N.W.2d 337, 337-38 (Iowa 1992); *Thornton*, 571 N.W.2d at 32.

Furthermore, at the summary judgment stage, the court may not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the evidence of the nonmovant is to be believed, all conflicts in the evidence are to be resolved in favor of the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Rasmussen v. Quaker Chem. Corp.*, 993 F.Supp. 677, 681 (N.D. Iowa 1998).

While the moving party has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law, the party resisting summary judgment, however, must set forth specific material facts in dispute and show there is a genuine issue for trial or explain why facts cannot be presented to justify a continuance under Rule

1.981(5). *Suss v. Schammel*, 357 N.W.2d 251, 254 (Iowa 1985); *Thornton*, 571 N.W.2d at 32; *Bradshaw v. Wakonda Club*, 476 N.W.2d 743 (Iowa Ct. App. 1991). By requiring the party resisting the motion to set forth specific issues of material fact, the basic purpose of summary judgment is achieved – to weed out paper cases to make way for litigation that has something to it. *Humphries*, 566 N.W.2d at 872.

ANALYSIS

I. Retroactivity of *State v. Bollinger* to *State v. Vander Esch*

In *Teague v. Lane*, a plurality of the United States Supreme Court set forth the standards to be applied in determining whether a new criminal rule should be applied retroactively. *Teague v. Lane*, 489 U.S. 288, 299-310 (1989) (O'Connor, J., plurality opinion). According to the plurality, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Id.* at 301 (citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)). Stated another way, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* (citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting)) (emphasis in original). As applied to Vander Esch's case, it is clear that *Bolsinger* announced a new rule – that is, it announced that fraud or deception may vitiate consent even though neither is expressly mentioned in the sexual abuse statutes and that fraud in the factum vitiates consent but not fraud in the inducement and set forth what types of conduct falls into the fraud in the factum and fraud in the inducement categories.

In *Teague*, the plurality distinguished between cases that were on direct review when the new rule was announced and those that were final when the new rule was announced and discussed Justice Harlan's view with regard to the retroactivity of new rules to final cases. *Id.* at 303-04. A case is "final" "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari has elapsed'" before the new rule was announced. *Id.* at 295 (citing *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986)) (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)). As applied to Vander Esch's case, no dispute exists that his case was final when *Bolsinger* was decided.

According to Justice Harlan, "new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review." *Id.* at 303-04 (citing *Mackey v. United States*, 401 U.S. 667, 675 (1971)

(Harlan, J., concurring in judgments in part and dissenting in part); *Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting opinion)). *See also Griffith v. Kentucky*, 479 U.S. 314, 322 (1987) (adopting Justice Harlan's retroactivity approach to cases on direct review). Justice Harlan believed that in general new rules should not apply retroactively to cases on collateral review due mainly to finality and comity concerns:

> He argued that retroactivity for cases on collateral review could "be responsibly [determined] only by focusing, in the first instance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Mackey*, 401 U.S., at 682, 91 S.Ct., at 1175 (opinion concurring in judgments in part and dissenting in part). With regard to the nature of habeas corpus, Justice Harlan wrote:
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> > "Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."
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> *Id.* at 682-683, 91 S.Ct., at 1175.
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> Given the "broad scope of constitutional issues cognizable in habeas," Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Id.*, at 689, 91 S.Ct., at 1178. As he had explained in *Desist*, "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function. . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." 394 U.S., at 262-263, 89 S.Ct., at 1041. *See also Stumes*, 465 U.S., at 653, 104 S.Ct., at 1347 (Powell, J., concurring in judgment) ("Review on habeas to determine that a conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark'") (citation omitted).

Id. at 305-07 (emphasis in original).

Nevertheless, Justice Harlan recognized that two exceptions exist to this general rule of non-retroactivity of new rules on collateral review. *Id.* at 307. First, a new rule should be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id.* (quoting *Mackey*, 401 U.S. at 692). Second, a new rule should be applied retroactively "if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (citing *Mackey*, 401 U.S. at 693) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotations omitted).

The plurality agreed with Justice Harlan's description of the function of collateral review and adopted his view of retroactivity for cases on collateral review. *Id.* at 310. With respect to the second exception, the plurality observed that the language used by Harlan leaves no doubt that he meant that the second exception should be reserved for "watershed rules of criminal procedure" (or "bedrock procedural elements") that "implicate the fundamental fairness of the trial" and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 311-12, 313 (citing *Mackey*, 401 U.S. at 693-94). Besides this modification, the plurality adopted Harlan's approach and held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.*

The United States Supreme Court in *Penry v. Lynaugh* adopted the plurality's approach in *Teague* regarding the retroactivity of new criminal rules on collateral review. *Penry v. Lynaugh*, 492 U.S. 302, 313-14, 329-30 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). The Court modified the first exception by including within its ambit new criminal rules placing a certain class of person beyond the State's power to punish:

> Although *Teague* read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that the Eight Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, *Ford v. Wainwright*, *supra*, 477 U.S., at 410, 106 S.Ct., at 2602 (insanity), or because of the nature of their offense, *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape) (plurality opinion). In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of

> retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey*, *supra*, at 693, 91 S.Ct., at 1180. Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.

Id. at 329-30.

The Iowa Supreme Court has adopted the plurality's analysis in *Teague* regarding the retroactivity of new criminal rules in postconviction relief proceedings. *See, e.g., Morgan v. State*, 469 N.W.2d 419, 422-25 (Iowa 1991) (adopting the general rule of non-retroactivity of new criminal rules to collateral proceedings and the exceptions to this rule and holding that *Coy v. Iowa*, 487 U.S. 1012 (1988), which held that a defendant has a Sixth Amendment right to physically face those who testify against them, announced a new rule of criminal procedure and that neither of the exceptions applied so that the district court did not err in refusing to apply *Coy* retroactivity to the defendant's conviction); *Brewer v. State*, 444 N.W.2d 77, (Iowa 1989) (recognizing that the plurality in *Teague* held in general that "new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review" and adopting that view in state postconviction relief proceedings) (citing *Teague*, 489 U.S. at 309-15).

Recently, in *Schriro v. Summerlin*, the United State Supreme Court further clarified *Teague*. *Schriro v. Summerlin*, 524 U.S. 348, 351-53 (2004). The Court distinguished between new substantive and procedural rules and delineated which ones should be applied retroactively on collateral review. *Id.* at 351. According to the Court, "[n]ew *substantive* rules generally apply retroactivity." *Id.* (emphasis in original). New substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351-52 (citing *Bousley v. United States*, 523 U.S. 614, 620-621 (1998); *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Teague*, 489 U.S. at 311). Substantive rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or "faces a punishment that the law cannot impose on him." *Id.* at 352 (citing *Bousley*, 523 U.S. at 620) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

In a footnote, the Court recognized that "[w]e have sometimes referred to rules of this latter type [constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish] as falling under an exception to *Teague*'s bar on retroactive application of procedural rules"; however, "they are more accurately characterized as substantive rules not subject to the bar." *Id.* at 352 n.4 (citing *Horn v. Banks*, 536 U.S. 266, 271 n.5 (2002) (per curiam)). Similarly, Justice Harlan has stated that rules that "place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" constitute new substantive due process rules. *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Thus, it appears that substantive rules are not subject to the non-retroactivity rule; and even if they are subject to this rule, they constitute an exception to the non-retroactivity rule.

On the other hand, the Court stated that new procedural rules do not apply retroactively. *Id.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* Due to the speculative connection to innocence, the Court gives retroactive effect to only watershed procedural rules that "'implicat[e] the fundamental fairness and accuracy of the criminal proceeding.'" *Id.* (citing *Saffle*, 494 U.S. at 495) (quoting *Teague*, 489 U.S. at 311). The status of a new procedural rule as "fundamental" does not suffice; the rule must be one "'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313) (emphasis in original). The class of rules falling under this ambit is extremely narrow. *Id.* (citing *Tyler v. Cain*, 533 U.S. 656, 667 n.7 (2001)) (citing *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)). Thus, the distinction between new substantive rules and new procedural rules is important in the context of collateral review proceedings. *Bousley*, 523 U.S. at 620.

The Court also set forth some guidelines for determining whether a new criminal rule is substantive or procedural. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 524 U.S. at 353. (citations omitted). For example, the rule is substantive if it "hold[s] that a . . . statute does not reach certain conduct" or makes conduct criminal. *Bousley*, 523 U.S. at 620-21 (citing *Teague*, 489 U.S. at 312; *Davis*, 417 U.S. at 346). Moreover, it is substantive if it "decriminalize[s] a class of

conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons." *Saffle*, 494 U.S. at 495 (citing *Penry*, 492 U.S. at 329-30) (citation omitted). On the other hand, "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Schriro*, 542 U.S. at 353 (citing *Bousley*, 523 U.S. at 620) (emphasis added).

Applied to the facts of this case, the new criminal rule announced in *Bolsinger* is more appropriately categorized as a substantive rule, rather than a procedural rule. The rule announced in *Bolsinger* narrowed the scope of certain sexual abuse criminal statutes by interpreting their critical terms. The rule altered the range of criminal conduct by holding that the sexual abuse statutes do not reach consent that is procured by fraud in the inducement but does reach consent that is procured by fraud in the factum. Thus, the rule in *Bolsinger* decriminalized a class of conduct—that is, consent procured by fraud in the inducement. The rule did not regulate the manner of determining the defendant's guilt; rather, it delineated whether or not the defendant could be found guilty of sexual abuse in the third degree under the language of the sexual abuse statutes. Therefore, the rule in *Bolsinger* is a substantive one and it carries a significant risk that a defendant coming within the rule's ambit, which includes Vander Esch, stands convicted of conduct that the law does not make criminal.

Because the rule announced in *Bolsinger* is a substantive rule, the rule either is not subject to the general rule of non-retroactivity or falls under the first exception to the general rule of non-retroactivity of new criminal rules on collateral review. In any event, the new substantive rule announced in *Bolsinger* must be retroactively applied to Vander Esch's case; and Vander Esch's convictions must be vacated.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED, ADJUDGED AND DECREED that Vander Esch's Motion For Summary Disposition is SUSTAINED and the State's Cross Motion For Summary Disposition is OVERRULED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Vander Esch's convictions for four counts of sexual abuse in the third degree are hereby VACATED.

IT IS SO ORDERED

Signed this 13th day of October, 2006.

James D. Scott
JUDGE, THIRD JUDICIAL DISTRICT OF IOWA

Contested Hearing Not Held